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SPAM COMPLIANCE -

FROM INTERNAL POLICIES TO M&A CHECKLISTS

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- Francoise Gilbert is the CEO and founder of the IT Law Group. She assists clients in protecting personal information and other data. This includes addressing compliance with information privacy, information security and data protection laws in the United States and globally. She reviews and improves privacy and security policies and procedures, assists in handling data security breaches, cooperates with information systems, marketing, and public relations department in ensuring that data protection concepts are implemented in the practices of companies. She also provides training programs and training materials for personnel and works on commercial transactions related to the handling of electronic data, such as outsourcing, ASP, service agreements, as well as mergers & acquisitions.
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- Ms. Gilbert is a Co-Chair of the PLI Privacy Law Institute, the e-Privacy Committee of the California Bar Association, and the Knowledge Net Network of the IAPP/TRUSTe, and an Adjunct Professor of law at the University of Illinois, Chicago Campus. She holds laws degrees from Loyola University (Chicago, Illinois) and University of Paris (France), and a graduate degree in Mathematics. She is admitted to practice law in California, Illinois, and France. Before founding the IT Law Group, Ms. Gilbert was a partner in national law firms based in Chicago, IL and in Palo Alto, CA.
- Based in Silicon Valley, and drawing upon the resources of affiliates on the East coast, in Canada, Asia and the European Union, the IT Law Group serves companies in the Information Technology Markets.

AGENDA

- SCOPE
- CAN SPAM BASICS
- INTERNAL POLICIES
- PURCHASING LISTS FROM THIRD PARTIES
- DEALING WITH SUBCONTRACTORS
- MERGERS & ACQUISITIONS

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MARKETING CHANNELS

- Email <> CAN SPAM and anti-spam laws
- Wireless <> CAN SPAM and Communications Act
- Telephone <> Telephone Consumer Protection Act, Consumer Fraud and Abuse Act, Telemarketing Sales Rules; Do Not Call Lists
- Fax <> Telephone Consumer Protection Act; Junk Fax laws
- Snail Mail <> Consumer Protection laws

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CAN SPAM ACT

- **Commercial Electronic Mail Messages**
 - *Electronic mail messages the primary purpose of which is the commercial advertisement or promotion of a commercial product or service*
- **Transactional of Relationship Electronic Mail Messages**
 - *Electronic mail messages, the primary purpose of which is to*
 - *Facilitate, complete or confirm a commercial transaction*
 - *Provide warranty or recall information*
 - *Provide notice of change in a subscription, membership, account, loan or other relationship*
 - *Provide information regarding employment relationship or benefit plan*
 - *Deliver goods or services, product updates or upgrades under a prior transaction*

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COMMERCIAL MESSAGES

- **No false or misleading transmission information**
 - From; To
 - Routing information
 - Originating domain name
 - Originating email address
- **No deceptive or misleading subject headings**
- **Three disclosures required:**
 - Clear and conspicuous **identification that the messages is an advertisement or a solicitation**
 - Clear and conspicuous **notice of the opportunity opt-out** from receiving future commercial email messages from the Sender
 - Valid **physical postal address of the Sender.**

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COMMERCIAL MESSAGES / 2

- Must include a **functioning return email address** or similar Internet-based mechanism, clearly and conspicuously displayed, for recipients to use to opt-out of receiving future commercial email messages
- This return address or opt-out mechanism must remain capable of receiving messages or communications for **30 days** or more after the transmission of the original message
- Sender (and others acting on Sender's behalf) may **not initiate commercial messages more than 10 business days after the recipient has opt-ed out** of receiving commercial messages

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COMMERCIAL MESSAGES / 3

- **Aggravated violations:**
 - Address **harvesting** from websites that have published a notice prohibiting the transfer of email addressed for the purpose of sending email
 - **Dictionary attacks** combining names, letters, numbers into multiple permutations
 - Automated creation of **multiple email accounts**
 - Relay or transmission through unauthorized access to a third party's computer

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RECENT FTC CASES

- **Jumpstart Technologies (March 2006)**
- **Optin Global (FTC + CA State AG, April 2006)**
- **FTC Settlements with both companies required:**
 - *Notice that the email was an advertisement*
 - *Clear and conspicuous notice of opportunity to opt out*
 - *Honoring opt-out requests within 10 business days*
 - *Deceptive from lines (Jumpstart used a "friend's" address)*
 - *Establishment of an affiliate monitoring program*
- **Penalties:**
 - *Jumpstart: \$900,000*
 - *Optin: \$2.4 million representing the total of the defendant's ill-gotten gains; reduced to \$450,000 after review of the financial records of the company*

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COMPLIANCE PROGRAM

- Create a CAN-SPAM compliant email marketing policy
- Keep it simple; cover most issues in a set of simple principles
- Prepare written compliance policies, procedures, templates
- Compare with similar policies, and ensure compatibility or consistency: fax, telemarketing, etc.
- Coordinate with company Privacy Policy, document retention policy
- Set up computer databases and software to handle opt-out requests, specifically if a menu of options is provided
- Train and re-train, and, re-re-train personnel (including temporary personnel, subcontractors)

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OPT-OUT PROCEDURES

- CAN SPAM Act allows companies to:
 - Use a menu of options, provided that one option allows to opt-out of "ALL" emails
 - Distinguish between different divisions or businesses of the company
- When designing unsubscribe message and menu, take advantage of CAN SPAM's menu capability to allow for sufficient options to keep some contact with customers
- Enable scrubbing of third parties (service provider, agents) emails against database
- Ensure ability to update the database daily (but not less than weekly) with new opt-out requests to ensure compliance with the 10 day rule

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DATRAN MEDIA

- DATRAN MEDIA LLC (New York AG March 2006)
- Facts:
 - Datran obtained lists from third parties, which on their own websites, had promised consumers they would NOT sell, rent or share such information with third parties.
- Holding:
 - A written warranty or representation from the list provider regarding the manner in which the list was compiled or collected is not sufficient
- \$1.1 million penalty
- Appoint Chief Privacy Officer

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DATRAN / 2

- ■ **When acquiring lists in the future, Datran must:**
 - ■ *Independently review all applicable privacy policies and statements in place at the time when the PII was collected*
 - ■ *Independently confirm that these policies explicitly revealed to consumers that the information collected would or might be shared, or that customers permitted such sharing*
 - ■ *Retain for 5 years copies of these policies*
- ■ **If in the future Datran learns that a list was collected contrary to representations in privacy policy, Datran must:**
 - ■ *Immediately cease using the list for any commercial purpose*
 - ■ *Within 5 days apprise the AG office*
 - ■ *If AG requests, destroy all data*

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USING THIRD PARTY LISTS

- ■ **Due diligence**
 - ■ *Source, origin of the data*
 - ■ *Compliance with Policies*
 - ■ *Whether entity has received consent to the transfer of the email addresses*
 - ■ *Impact of foreign laws (e.g. EU prohibition on outbound transfers)*
- ■ **Contract provisions**
 - ■ *Representations and Warranties*
 - ■ *Origin of the contact information*
 - ■ *Whether recipients have opted-out; and the opt-out status, if any*
 - ■ *Third party's right to rent or sell the information*
 - ■ *Indemnification; insurance*

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SUBCONTRACTORS

- ■ **CAN SPAM prohibition:**
 - ■ *Illegal to sell or transfer email addresses of people who opt-ed out of receiving commercial emails, even in the form of mailing lists, unless the addresses are transferred so that another entity can comply with the law.*
- ■ **Due diligence**
 - ■ *Review subcontractor's policies and procedures related to spam, privacy, and security compliance*
- ■ **Contractual provisions**
 - ■ *Comply with your company's policies, procedures, and processes:*
 - ■ *Not less than weekly updates to list of the opt-out requests*
 - ■ *Risk Management*

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MERGERS & ACQUISITIONS

- **CAN SPAM Act Prohibition**
 - *Illegal to sell, lease, transfer email addressed to individuals who have opted out of receiving commercial messages, except for the purpose of compliance with the law.*
 - *Exception: individuals provide affirmative consent*
- **Due Diligence**
 - *Identify source of information in the databases*
 - *Review Anti-Spam Compliance Policy, Privacy Policy*
 - *Review Seller's past compliance with applicable Anti Spam laws*
 - *Review Seller's contracts with third parties and lists providers*
 - *Review other contracts that pertain to databases*
 - *EU prohibition against transfers outside of the EU*

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MERGERS & ACQUISITIONS / 2

- **Representations and Warranties**
 - *Source of the databases*
 - *Compliance with CAN SPAM and other anti-spam laws*
 - *Compliance with Privacy Policy, and applicable data privacy or security laws*
 - *No investigations, suits or threatened suits regarding use or misuse of personally identifiable information, email addresses*
- **Indemnification for liability related to:**
 - *Past violations*
 - *Unscrubbed databases*
 - *Illegal transfer of information*
- **Post Transaction**

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PURCHASER'S OBLIGATIONS

- *Purchaser's obligations to individuals who did opt-out of receiving messages from the Seller?*
- *Does the obligation transfer to the Purchaser?*
- *To all divisions of the Purchaser?*
- *What if there is a conflict between the Purchaser's opt-out list, and the Seller's opt-out list?*

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TAKE AWAY

■ **INTERNAL POLICIES**

- *Love hate relationship with the Marketing Department*
- *Make IS part of the picture*

■ **PURCHASING LISTS FROM THIRD PARTIES**

- *Don't stick your head in the sand*
- *Importance of due diligence*
- *Contractual reps and warranties are not enough*

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TAKE AWAY

■ **SUBCONTRACTORS AND AFFILIATES**

- *Remember Datran*
- *Due diligence*
- *Contractual provisions*
- *Audit, supervision*

■ **MERGERS AND ACQUISITIONS**

- *Remember Datran*
- *Due diligence*
- *Review all applicable policies*
- *Reps and warranties*

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QUESTIONS?

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